***United States Court of Appeals***

***for the Second Circuit***


# BRIEF FOR APPELLEE

# 74-1770

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*To be argued by*
MICHAEL HARTMERE

P/S

# United States Court of Appeals

## FOR THE SECOND CIRCUIT

**Docket No. 74-1770**

UNITED STATES OF AMERICA,

*Appellee,*

—v.—

WILLIE JEMISON, JR.,

*Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

## BRIEF FOR THE APPELLEE



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## BRIEF FOR THE APPELLEE

### Statement of the Case

On November 6, 1972, a Federal Grand Jury returned a True Bill of Indictment (H-373) charging the defendant with violation of Title 21, United States Code, Section 841(a)(1) in two counts. Count One charged that the defendant had distributed and dispensed approximately 21.77 grams of cocaine on July 14, 1972; Count Two charged that the defendant had distributed and dispensed approximately 20.38 grams of cocaine on July 18, 1972.

Defendant entered a plea of not guilty to each count on December 18, 1972. On February 5, 1973, defendant moved for a Rule 21(b) transfer to the District of Massachusetts, representing his intent to plead guilty to H-373 and to a federal indictment in Massachusetts. On July 5, 1973, defendant retained his plea of not guilty in Massachusetts, and H-373 was subsequently returned to the District of Connecticut.

On October 2, 1973, a Federal Grand Jury sitting at New Haven, Connecticut, returned a True Bill of Indictment (H-578) charging the defendant with violation of Title 21, United States Code, Section 841(a)(1) in two counts. This indictment charged the defendant with the same offenses as had been charged in the previous indictment (H-373).

On January 30, 1974, a jury trial commenced before the Honorable T. Emmet Clarie. The jury trial concluded on February 1, 1974, and after approximately twenty minutes of deliberation, the jury returned a verdict of guilty on both counts. On April 30, 1974, the defendant was sentenced to a term of four years incarceration on each count, to run concurrently, pursuant to Title 18, United States Code, Section 4208(a)(2). Subsequently, a timely notice of appeal was filed.

## Statutes Involved

United States Code, Title 21

§ 841. Prohibited acts A—Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

## Questions Presented

1. Was the defendant denied a fair trial?

2. Did the trial court commit error in its charge to the jury?

## Statement of Facts

Trooper Bryan Esson, Connecticut State Police Narcotics Squad, working in an undercover capacity on July 14, 1972, met with an informant in Hartford, Connecticut, and the two then proceeded to a local restaurant. At the restaurant, Trooper Esson and the defendant, Willie Jemison, Jr., negotiated as to the price Trooper Esson was to pay for a "piece" of cocaine (Tr. 8, 9, 10).* Later, at the apartment of the defendant's estranged wife, the defendant sold approximately 21.77 grams of cocaine to Trooper Esson for six hundred dollars (Tr. 15).

On July 18, 1972, Trooper Esson and the same informant again met the defendant at the same restaurant. Again, Trooper Esson and the defendant negotiated concerning the purchase of a "piece" of cocaine and agreed that the sale was to take place at the same apartment (Tr. 24). At the apartment, the defendant sold approximately 20.38 grams of cocaine to Trooper Esson for six hundred dollars (Tr. 27, 28). Trooper Esson testified that on both occasions the defendant appeared ready, willing and able to complete the transactions, and that the defendant did not appear to be under the influence of any drug (Tr. 33). Three agents of the Drug Enforcement Administration testified to the surveillance conducted on the two transactions. The Government then rested its case (Tr. 129).

The theory of the defense was entrapment. The defense called Martha Jemison, the defendant's estranged wife, who testified that she had seen her husband "snort" white powder (Tr. 139). Mrs. Jemison witnessed both the July 14th and July 18th transactions involving the sale of cocaine and testified that her husband was using cocaine at the time of the sales (Tr. 148, 149, 150, 151). Jerry

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* References marked "(Tr.)" refer to the transcript of proceedings in the trial court.

Harrison, a life-long friend of the defendant's, testified that upon his (Harrison's) release from prison in February or April, 1971, he had seen the defendant snort cocaine, and that he had counselled defendant concerning defendant's drug use (Tr. 173, 174, 175). Henry Jemison, the defendant's brother, testified that he had seen the defendant using cocaine and other drugs during the summer of 1972. The defendant testified that from 1968 through 1972 he had used various drugs, including cocaine (Tr. 212). The defendant, during the three years from 1970 to 1972 was a "pimp" and used the profits from this enterprise to purchase drugs (Tr. 214, 215). The defendant admitted selling the cocaine to Trooper Esson on both occasions.

The Government, to show a predisposition to commit the offenses charged and thereby counter the defense of entrapment, called several witnesses. Special Agent Gary J. Sloboda, Drug Enforcement Administration, testified that he had first met the defendant on March 5, 1972 (months before defendant sold cocaine to Trooper Esson), in Springfield, Massachusetts. At this time, Agent Sloboda and Special Agent John F. O'Brien (D.E.A.) were negotiating with the defendant concerning the purchase of one pound of cocaine (Tr. 332). Agent Sloboda characterized the defendant's appearance at this time as "very cool, very methodical and very professional" (Tr. 333). Agent O'Brien also testified to the negotiations with defendant concerning the purchase of one pound of cocaine (Tr. 451). Agent O'Brien testified that the defendant had placed four ounces of cocaine on a scale and stated to O'Brien, "Now, we'll see who is the professional" (Tr. 468). The defendant directed Agent O'Brien to take the cocaine home and, if pleased with the quality, to pay $3,500 to someone who would appear at his home at midnight (Tr. 468). Agent O'Brien later paid $3,500 to a third party for the cocaine (Tr. 472).

The informant testified that he had begun cooperating with drug officials after learning that his seventeen year

old son was using cocaine (Tr. 376). A former Burns security guard, the informant was working full time for a construction company both during the summer of 1972 and during the time of trial (Tr. 393). The informant testified that he had met with the defendant one evening and telephoned the defendant from work once prior to the July 14th sale of cocaine. The informant telephoned the defendant once concerning the second sale of cocaine to Trooper Esson (Tr. 400). A bookkeeper for the construction company where the informant was employed during the summer of 1972 testified that the informant had worked forty hours per week for the weeks ending July 15, 1972 and July 22, 1972, and that the informant had worked eight hours per day including the dates of the two sales (Tr. 446, 447).

## ARGUMENT

### I.

### The defendant was not denied a fair trial.

Commenting on the role of a Federal prosecutor, Mr. Justice Sutherland wrote:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much

> his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

*Berger* v. *United States*, 295 U.S. 78, 88 (1935).

The Court found that "[t]he prosecuting attorney's argument to the jury was undignified and intemperate, containing improper insinuations and assertions calculated to mislead the jury." *Berger* v. *United States, supra,* at 85. The Court further stated that had the evidence of guilt been "strong or overwhelming", a different conclulsion (other than reversal because of prosecutorial misconduct) might have been reached. *Berger* v. *United States, supra,* at 89. The law is clear that a prosecuting attorney's conduct must be viewed in the context of the entire trial. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 239, 242 (1940); *United States* v. *White*, 486 F.2d 204, 207 (2d Cir. 1973). Viewed in its entirety, the evidence (largely uncontested) against the defendant herein is both overwhelming and demonstrates that there has been no prosecutorial misconduct.

The defendant complains, *inter alia,* of questions asked of him and other witnesses by the prosecutor. However, the defense in this case was entrapment, and it has long been held that a defendant claiming entrapment "cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue." *Sorrells* v. *United States*, 287 U.S. 435, 451 (1932); *United States* v. *Bishop*, 367 F.2d 806, 809 (2d Cir. 1966).

Defendant's estranged wife testified that she had left the defendant solely because of his drug use. The prosecutor then asked defendant's wife if there were any other fields of illegal endeavor that defendant might have been in at that time to cause friction in the marriage (App. 1a, 2a,

3a).* The defendant's reliance upon *United States* v. *Rinaldi,* 301 F.2d 576 (2d Cir. 1962), is misplaced. The prosecutor in *Rinaldi* asked the defendant's wife if the defendant had ever been *convicted* of a crime and received an *affirmative* answer. In the instant case, the prosecutor did not ask about the defendant's convictions and no answer was elicited. Furthermore, defendant's counsel asked whether defendant was engaged in "any type of legitimate—legal" employment. The defendant testified on direct examination that he had been a "pimp" for up to three years during this same period (App. 4a, 5a, 6a).

Defendant's wife was also asked whether defendant supported her during this time, and the witness responded negatively. The defendant's criminal record showed that defendant had been arrested during this period for non-support. Certainly, the prosecutor's question bore on the question of the credibility of the witness and was a bona fide and proper question. After defense counsel's objection, the prosecutor and defense counsel approached the Bench. At this time, the prosecutor picked up the defendant's criminal record from counsel table. That the prosecutor did not wave the criminal record in front of the jury is evidenced by the fact that, even at the bench conference, defense counsel did not know what the document was (App. 7a, 8a, 9a).

Defendant claims that the cross-examination of him by the prosecutor was improper. Defendant relies upon *United States* v. *Provoo,* 215 F.2d 531 (2d Cir. 1954) which held cross-examination of a defendant as to suspected acts of criminal conduct (not convictions) to be improper. The Court in *Provoo* indicated that if cross-examination as to misconduct would actually cast light on the credibility of the defendant, such cross-examination might be allowed.

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* References marked "(App.)" refer to Appellee's Appendix.

*United States* v. *Provoo, supra* 537. However, the defendant in this case had asserted an entrapment defense and thus is precluded from complaining of an appropriate and searching inquiry into his previous conduct to disprove an alleged absence of intent. *Sorrells* v. *United States,* 287 U.S. 435, 451 (1932); *United States* v. *Bishop,* 367 F.2d 806, 809 (2d Cir. 1966).

Judge Learned Hand indicated that the defense of entrapment presents two issues: "(1) did the agent induce the accused to commit the offense charged in the indictment; (2) if so, was the accused ready and willing without persuasion and was he awaiting any propitious opportunity to commit the offense. "*United States* v. *Sherman,* 200 F.2d 880, 882 (2d Cir. 1952). The accused bears the burden of proof as to "inducement"; however, the Government must prove "predisposition beyond a reasonable doubt." *United States* v. *Riley,* 363 F.2d 955 (2d Cir. 1966).

The questions asked of the defendant at trial had a direct bearing on his predisposition to commit the offenses charged. The defendant had admitted on direct examination that he was a heavy user of cocaine, and that the drugs he sold to Trooper Esson had come from a man named "Blue". On cross-examination, the defendant testified that he supported his habit by "pimping" and that he had no other means of obtaining money to buy drugs (App. 10a, 11a, 12a, 13a, 14a). When asked by the Government prosecutor whether the two admitted sales to Trooper Esson were the only sales of drugs he had made to support his habit, the defendant exercised his Fifth Amendment right. The Court correctly explained to the jury that no inference should be drawn from the defendant's claim of this right. However, the defendant's answers were inconsistent with his previous testimony and the Government prosecutor was merely attempting to point that out (App. 15a to 26a). The Government then called two federal agents to testify to the prior negotiations with defendant for one pound of

cocaine and the prior distribution by defendant of four ounces of cocaine (Tr. 328 to 365; 449 to 495). This prior similar conduct was properly admitted by the trial judge, and the defendant has not claimed error on this point.

Defendant has claimed that questions put to the informant by the prosecutor suggested that the informant's co-operation in other cases led to convictions. The Court had ruled that the defense could inquire into payments to the informant for other cases (all of which ended in convictions), but that the Government could not elicit the outcome of the other cases (Tr. 380 to 385). Because there had been more than an eighteen month lapse, the informant's testimony is to monies he had been paid for his co-operation was confusing (Tr. 422, 423, 424). The Government prosecutor then inquired of the informant concerning the exact amount of money he (the informant) had received, and the answers were clear (App. 27a, 28a, 29a). The Government also inquired of the informant as to whether he remembered the names of other defendants and the results of other cases, not for the actual names and results which he was instructed not to give, but merely to show the lack of memory by the witness. This avenue of questioning had not been closed by the Court, and it was proper for the Government to question the witness as to his lack of memory.

The United States Supreme Court recently held that "[A] court should not lightly infer that a prosecutor an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." *Donnelly* v. *DeChristoforo,* — U.S. —, 94 S. Ct. 1868 (1974).

The defendant has also claimed that the summation of the prosecutor was improper. However, every remark by the prosecutor was supported by evidence in the record.

The prosecutor's summation in this case did no more that recapitulate the testimony of the witnesses and argue why it should or should not be believed. This Court has recently held, in a similar situation that: "It is the accepted and proper purpose of summation to make such arguments regarding the purpose and credibility of any witness so long as there is sufficient support therefor in the record before the jury." *United States* v. *DeAngelis,* 490 F.2d 1004, 1008 (2d Cir. 1974).

The defense relies upon *United States* v. *Bivona,* 487 F.2d 443 (2d Cir. 1973), in urging reversal of defendant's conviction. In *Bivona,* the prosecutor gave unsworn testimony in his summation, the greater portion of which was without support in the record, and asserted his personal belief in the defendant's guilt by derogating the defendant's testimony while placing the "imprimatur of the government" on prosecution witnesses. Such is not the case here. But, even in *Bivona,* this Court held:

> "Although it is urged that reversal may have a more powerful impact on the prosecutor than mere reprimand, in a case such as this, where the prejudice to the defendant was negligible and guilt so clear, reversal is simply too drastic a measure. Of course, where a defendant's constitutional rights have been violated by the police or the prosecutor, this sanction must be applied. But, to adopt this approach in response to comments evoked by the dynamics of a trial, which in the context of the whole proceeding fall far short of constitutional infringement, would be sacrificing too much."

*United States* v. *Bivona, supra,* at 447.

There was no attempt here on the part of the prosecutor to misrepresent facts in evidence, to use inflammatory epithets, or to interject both the prestige of the government and

the prosecutor's veracity to bolster the government's case, as was the case in *United States* v. *Gonzalez,* 488 F.2d 833 (2d Cir. 1973). The prosecutor in the present case was merely summarizing facts which were in evidence. Although the prosecutor did use the phrase "I submit . . .", what followed were facts in evidence. The prosecutor was not placing his credibility in issue by using the first person of syntax to open a paragraph. To hold otherwise would be to concentrate on mere syntax, while disregarding substance. Possibly inflammatory words such as "high class junkie", "pimp", and "professional" had been placed into evidence, mostly by the defendant. The defendant had characterized his own behavior during the time of the sales of cocaine as "wild as a reindeer" (Tr. 216).

The prosecutor's conduct in the present case, when viewed *in toto,* did not amount to prosecutorial misconduct warranting reversal. [1] Additionally, the trial court gave curative instructions to the jury regarding comments made by both counsel during summation (Tr. 531). If prejudice did result to the defendant from the prosecutor's comments, it was minimal and cured by the action of the trial court. *United States* v. *Pfingst,* 477 F.2d 177 (2d Cir. 1973), *cert. denied,* 412 U.S. 941 (1973).

## II.

## The trial court did not commit error in its charge to the jury.

The defendant has claimed that the trial court erred in failing to charge the jury that it could find the defendant guilty of simple possession of cocaine, a lesser included offense to the offense of distribution. Rule 31(c) Federal Rules of Criminal Procedure provides: "The defendant may be found guilty of an offense necessarily included in the

[1] Judge Mansfield collected the recent decisions of this Circuit in *United States* v. *DeAngelis, supra,* at 1011.

offense charged . . .". The United States Supreme Court has held that: "[T]he lesser offense must be included within but not, on the facts of the case, be completely encompassed by the greater. A lesser-included offense instruction is only proper where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-included offense." *Sansone* v. *United States,* 380 U.S. 343, 350 (1965). To hold otherwise would invite the jury to pick between the felony and misdemeanor and thereby to determine the punishment to be imposed, a duty Congress has traditionally left to the judge. *Sparf* v. *United States,* 156 U.S. 51, 63-64 (1895); *Berra* v. *United States,* 351 U.S. 131, 135 1956).

The defendant in the present case admitted in his testimony all of the essential elements of the offenses charged in the indictment (Tr. 207-243, 264-323). Assuming, *arguendo,* that possession is a lesser included offense to the offense of distribution, the actual distribution by the defendant in this case was not a disputed factual issue. The defendant did not admit guilt to possession of cocaine but dispute distribution. The defendant admitted the entire transactions, but claimed he was entrapped as to the entire transactions. Therefore, there was no disputed factual element necessary for distribution not required for the lesser included offense of simple possession. *United States* v. *Markis,* 352 F.2d 860, 867 (2d Cir. 1965), *vacated on other grounds,* 387 U.S. 425 (1967).

The proof of guilt as to the offenses charged in the indictment in the present case was overwhelming. A defendant is entitled to an instruction on a lesser included offense only if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater. *Keeble* v. *United States,* 412 U.S. 205, 208 (1973). Due to the overwhelming evidence of guilt and defendant's admissions necessitated by the entrapment defense, the defendant in the present case was not entitled to his requested lesser included defense charge.

## CONCLUSION

**The appellant was not denied a fair trial and there was no error in the rulings of the District Court during trial. It is respectfully urged that the judgment of conviction in this case be affirmed.**

Respectfully submitted,

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*United States Attorney*

By: MICHAEL HARTMERE
*Assistant United States Attorney*

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# United States Court of Appeals
## FOR THE SECOND CIRCUIT

No. 74-1770

UNITED STATES OF AMERICA

Appellee

v.

WILLIE JEMISON, Jr.

Appellant

## AFFIDAVIT OF SERVICE BY MAIL

ert Sensale, being duly sworn, deposes and says, that deponent
a party to the action, is over 18 years of age and resides at 914 Brooklyn Ave
ooklyn N.Y.
hat on the 9th day of September, 1974, deponent
the within Brief for the Appellee + APPENDIX
Charles Sturtevant, Esq. Federal Public Defender
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ey(s) for the Appellant in the action, the address designated by said attorney(s) for the
e by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post
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the State of New York.

Albert Sensale

to before me,

9th day of September 1974

WILLIAM A. McKAGNEY
Notary Public, State of New York
No. 41-7846700
Qualified in Queens County
Certificate filed in Kings County
Commission Expires March 30, 1976